plaintiff incompetent. The law on this point, in my view, is beyond doubt. In every petition for administration the only order made by the court is for the grant of administration. The court does not appoint an administrator but in effect directs that letters of administration be issued to him. A similar question arose in *Chia Teck Liang* v. *Tan Soo Khiang*,[1] where Mills J., construing section 70 of the Probate & Administration Enactment of Johore, held that the order of court granting administration did not constitute a grant. In terms of the definition of the word "administration" in section 2 of the Probate & Administration Ordinance No. 35 of 1959 it can similarly be construed that the order of the 18th October, 1961, did not constitute an administration so as to vest in the defendant the authority to act as administrator in respect of the estate. In *P. Govindasamy Pillay & Sons Ltd.* v. *Lok Seng Chai & Ors.*,[2] Ismail Khan J. dealing with the same question, held at page 91 that, in his opinion, "it is only on extracting the grant of letters of administration that the petitioner can be said to be duly clothed with a representative character and to have acquired a title to the estate." It must, therefore, be held that the order granting the defendant administration did not make him an administrator within the meaning of rule 8 of Order 16.

The necessary consequence of the plaintiff's action in issuing the writ against the defendant is the next question to be considered. It had been held in *Ingall* v. *Moran*,[3] that an administrator suing before being issued with letters of administration has no title to sue and the action commenced by him was incompetent. This decision was followed in *P. Govindasamy Pillay & Sons Ltd.* v. *Lok Seng Chai & Ors.*, *supra*, by Ismail Khan J. It may be argued that in that case the court was merely considering the position of a person suing as a plaintiff and may, therefore, be distinguished here on the ground that the position is in reverse as the defendant is the person who is being sued as administrator. To that I can only say that what is sauce for the the goose must also be sauce for the gander. In the circumstances of the present case it must similarly be held that the action against the defendant was incompetent since its inception as the writ was clearly a nullity. In this way, notwithstanding the fact that the defendant had obtained an order for the grant of administration on the 18th October, 1961, and would, when issued with letters of administration, be clothed with a representative character, it cannot alter the fact that the proceeding against him was incompetent from the outset. There can, therefore, be one consequence only and that is that the action must be dismissed with costs. In this connection it is perhaps necessary to recall the words of Scott L.J. in *Ingall* v. *Moran*, *supra*, at page 164:—

> "It is true that when he (the plaintiff) get his title by the grant of administration he *prima facie* became entitled to sue, and could then have issued a new writ, but that was all. An application by him to treat the original writ of September 17 as retrospectively valid from that date would have been refused by the court, not only because it might prejudice existing rights of defence, but because it would not be permissible under the Rules of the Supreme Court or the Judicature Acts. The old writ was, in truth, incurably a nullity. It was born dead, and could not be revived."

Luxmore and Goddard L.JJ. concurred with Scott L.J. on this point and the decision to dismiss the plaintiff's action was unanimous. The only difference in the present case is that the plaintiff's action fails not because he himself had no title, as in *Ingall* v. *Moran*, *supra*, but because the defendant did not have any title to be sued as administrator. The plaintiff's action is accordingly dismissed with costs.

Lastly, it may be necessary to add a few words with regard to the motion filed by the plaintiff on the 8th October, 1964. The plaintiff was here asking for certain orders which would enable him to sue the defendant or the official administrator in respect of the estate. The fact that he has found it necessary to seek these orders is indicative of the uncertainty of the plaintiff's mind with regard to the propriety of the action which has been brought against the defendant. However, I need only say that orders of the nature asked for by the plaintiff are not normally given in interlocutory applications such as this but are usually sought by way of originating summons before the action is commenced. Rule 46 of Order 16 of the Rules of the Supreme Court has no relevance to the circumstances of the present case. For these reasons I make no order on the application and the costs thereof.

Action dismissed.

Solicitors: *Maxwell, Kenion, Cowdy & Jones.*

GIAN SINGH & CO. LTD. v. SUPER SERVICES

[O.C.J. (Winslow J.) December 16, 1964]

[Singapore — Summons in Chambers No. 1176 of 1964 in Suit No. 1588 of 1962]

Practice & Procedure — Time — Delay of one year — No proceeding in cause or action for one year — Requirement of a month's notice — Irregularity which can be condoned — R.S.C. 1934, O. LXI r. 5 — Meaning of "a proceeding in any cause or matter".

The plaintiffs issued a specially indorsed writ on December 11, 1962, claiming the sum of $18,386.78 due to them on a current account from the defendants. The defendants entered an appearance on December 28, 1962, and on January 23, 1963, Messrs. Francis & Co. entered their names as solicitors for the defendants and served the notice of appointment on Mr. L. A. J. Smith

who was acting for the plaintiffs. Thereafter Messrs. Francis & Co. from time to time applied for extension of time in which to file the defence. There were suggestions by the defendants that the matter be referred to arbitration but nothing came of it. On January 25, 1964, the solicitor for the plaintiffs requested the solicitors for the defendants to file the defence within 48 hours, failing which his instructions were to proceed to judgment. No action was however taken as counsel for the defendants was ill and on May 18, 1964 the solicitor for the plaintiff again wrote to the solicitors for the defendants asking them to file the defence. On May 19, 1964, Messrs. Pillai & Co. informed the solicitor for the plaintiff that they had been engaged by the defendants and the next day they filed a notice of change of solicitors and notified the solicitor for the plaintiff. No defence was filed and on September 1, 1964, final judgment was signed for the plaintiffs. The defendants applied to set aside the judgment, as irregular, on the ground that since the entry of appearance on December 28, 1962, there had been no proceeding in the action for one year and the plaintiffs had failed to comply with O. LXI r. 5(1) in that they had failed to give one month's notice of the intention to proceed.

Held: (1) there was no merit in the insistence of the defendants on the technical one month's notice on the plaintiffs' part to proceed with the action when the defendants themselves had taken an active part to keep the action alive by filing a formal notice of change of solicitors;

(2) in any event the technical non-compliance with O. LXI r. 5 was an irregularity which the court had power to condone at its discretion in the light of all the surrounding circumstances and did not render the final judgment a nullity.

Cases referred to:—

(1) *Mundy* v. *The Butterley Co. Ltd.* [1932] 2 Ch. 227.

(2) *Barclay Davit Co. Ltd.* v. *Taylor & Sons* [1946] 2 All E.R. 41.

(3) *Mason* v. *Franklin* 18 W.R. 527.

(4) *Warnock* v. *Mann* [1896] 2 Ir. Reports 630.

(5) *Webster* v. *Myer* (1884) 14 Q.B.D. 231.

(6) *Petty* v. *Daniel* (1887) 34 Ch. D. 172.

SUMMONS IN CHAMBERS.

L. A. J. Smith for the plaintiffs.

J. L. R. Pillai for the defendants.

Cur. Adv. Vult.

Winslow J.: Counsel for the applicants/defendants asks me to set aside, as irregular, a judgment entered in favour of the plaintiffs in this action on 1st September, 1964 on the ground that the plaintiffs have failed to comply with the provisions of Order LXI, r. 5 which states —

"5. (1) In any cause or matter in which there has been no proceeding for one year from the last proceeding had, the party who desires to proceed shall give a month's notice to the other party of his intention to proceed".

The plaintiffs issued a specially indorsed writ on 11th December, 1962 claiming the sum of $18,386.78 due to them on a current account from the defendants.

The defendants entered an appearance on 28th December, 1962 and on 23rd January, 1963 Messrs. Francis & Co. entered their names as solicitors for the defendants and served the notice of appointment on Mr. L. A. J. Smith who was acting for the plaintiffs. Thereafter Messrs. Francis & Co. from time to time applied to Mr. Smith for an extension of time in which to file their clients' defence which was generously granted. It should be noted that our Order XXII, r. 6, unlike the Malayan Order XXI, r. 6, does not empower extension by consent beyond ten days from the time limited for appearance in the case of specially indorsed writs.

On 29th January, 1963 Messrs. Francis & Co. enquired whether the plaintiffs were prepared to have the matter arbitrated, failing which they said they were going to apply to court for a stay of proceedings without taking any step to file their defence.

On 30th January, 1963 Mr. Smith replied that he was taking his clients' instructions.

Nothing further was heard of the matter until 25th January, 1964 when Mr. Smith was instructed to and did request Messrs. Francis & Co. to file their clients' defence within 48 hours, failing which his instructions were to proceed to judgment.

On 25th January, 1964 the firm of Messrs. Francis & Co. asked Mr. Smith to withhold action as Mr. H. A. Francis had been taken ill and was in Pakistan under medical advice to rest for 4 or 6 weeks.

By 18th May, 1964 Mr. Smith's patience was almost exhausted and he again wrote to Messrs. Francis & Co. asking them to file the defence.

On 19th May, 1964 Messrs. Pillai & Co. wrote to Mr. Smith informing him that they had been engaged by the defendants in place of Messrs. Francis & Co. and also asked for an extension of one week's time to file the defence.

On 20th May, 1964 Mr. Smith replied that he was not prepared to grant the extension.

On the same day, i.e. 20th May, 1964 Messrs. Pillai & Co. filed a notice of change of solicitors for the defendants incorporating the written consent of Messrs. Francis & Co. and also notified Mr. Smith.

Final judgment was signed for the plaintiffs on 1st September, 1964 as no defence had been filed.

The defendants claim that since entry of appearance on 28th December, 1962 there has been no proceeding in this action for one year and that the plaintiffs, before entering final judgment against them, failed to comply with Order LXI, r. 5(1) above and that, therefore, the said judgment should be set aside.

This brings me to the question as to what is meant by "a proceeding in any cause or matter" in Order LXI, r. 5. There is no doubt that the entry of appearance by the defendants in December, 1962 under the rules was a proceeding in the action but I think that it is also clear that correspondence between solicitors relating to the action does not necessarily have the status of proceedings in that action. In *Mundy* v. *The Butterley Co. Ltd.*[1] a formal notice by letter by the plaintiffs' solicitors to the defendants' solicitors to deliver an affidavit of documents pursuant to an order on a summons for directions was held not to be a proceeding in the action within the meaning of the English Order XXVI, r. 1. Maugham J. said —

"It seems to me then I have to decide, without very much assistance from those authorities, whether such a letter, which clearly is not an interlocutory application, is a proceeding in the action, the word 'proceeding' being one which certainly does suggest something in the nature of a formal step, either an application to the court which for the purposes of this rule would not be an interlocutory application, or at least a step taken by a litigant in prosecution of the action being a step which is required by the rules. In saying that, I am not attempting a complete definition but merely a kind of approximation to the sort of proceeding which is probably pointed to by the terms of the rule. I do not think on the whole that a letter written by a solicitor stating that he intends to set the action down for trial at a future date would be a proceeding in the action; I do not think a mere appointment to examine documents which had been offered for inspection would be a proceeding; I do not think that conferences between solicitors or either informal or quasi informal letters or conversations could be regarded as a proceeding."

In *Barclay Davit Co., Ltd.* v. *Taylor & Sons* [2] Romer J. referred to the above judgment and proceeded as follows:—

"The guidance which is to be found in *Mundy* v. *Butterley Co., Ltd.* is largely of a negative character, but, at all events, one does find this much, that a proceeding may take the form of a document and is not limited to a proceeding before the court (being a proceeding other than an interlocutory application).

It seems to me that the principal assistance I get from *Mundy* v. *Butterley Co., Ltd.* are the two passages from *Spincer* v. *Watts* where Lindley and Lopes, L.J.J., expressly gave their views as to what R.S.C., Ord. 26, r. 1, meant. Lindley L.J., after referring to the exception of interlocutory applications, said:

'I think that the exception throws some light upon the meaning of the words 'before taking any other proceeding in the action,' and, having regard to it and to the object of the rule, I think what is meant is, 'taking any proceeding with the view of continuing the litigation with the person against whom the proceeding is taken.'"

Lopes L.J., said:

'I think the rule intended a proceeding which is to have the effect of continuing the action — not a proceeding which has the effect of putting an end to the action.'

The views which I think that Lindley and Lopes, L.JJ., were indicating were to some extent in this sense: that, provided that you find that some act has been done by the plaintiff in the furtherance of the action towards its ultimate end, namely, trial, and that that act is not merely an informal one but is one which sustains some degree of formality and significance, that act is a proceeding within the meaning of R.S.C., Ord. 26, r. 1. I think that that view of the matter is very much the one which Maugham, J., himself was expressing in the *Mundy* case when he pointed out that there must be, at all events, a real formality, and that the word 'proceeding' certainly does suggest something in the nature of a formal step taken with a view to furthering the litigation. It is plain that informal discussions and informal documents, directed though they may be, and probably would be, to the advancement of the action towards trial, are not necessarily proceedings within the meaning of R.S.C., Ord. 26, r. 1. If, however, one finds something which has both formality and significance, and which is either taken or launched by the plaintiff with a view to bringing the action nearer to trial, it seems to me that that is a 'proceeding' within the meaning of R.S.C., Ord. 26, r. 1; and I think that one would be cutting down the scope and intention of the rule if one were to accept the more limited interpretation which counsel for the plaintiffs seeks to put upon it in cases where what is done is done by virtue of the provisions of an order."

It should be noted that the English Order 26, r. 1 which is the same as our Order XXVII, r. 1 relates, *inter alia*, to a plaintiff's right to discontinue an action after receiving the defence before he has taken any other proceeding in the action. In Order LXI, r. 5 it would seem that if *either* party takes a last proceeding in the action prior to judgment then time will run from the date of that 'last proceeding had'.

In the Irish case of *Mason* v. *Franklin* [3] Lawson J. held in connection with a similar rule that service of a notice of trial was taking a proceeding in the suit and that the notice was therefore a 'proceeding' within the rule.

In *Warnock* v. *Mann* [4] where a defendant sought by motion, after the expiration of one year from the 'last proceeding had', to have the action dismissed for want of prosecution, the plaintiff was permitted to proceed with his action although the court did hold that the motion was not a 'proceeding' which required one month's notice of intention to proceed. The importance of this case lies in the principle it seems impliedly to establish viz., that the object of requiring one month's notice of intention to proceed, after a lapse of more than one year since the 'last proceeding had', is to ensure that the defendant is not prejudiced or otherwise taken by surprise. The defendant in that case could not have been surprised as she herself knew all about it and had tried to get the action dismissed.

Mr. Pillai sought on the authority of *Webster* v. *Myer* [5] to establish that one month's notice of intention to proceed is necessary where no proceeding has been taken for a year. With this I entirely agree. The rule in question is quite clear and *Webster's* case merely shows that the obtaining of judgment for default of appearance is a proceeding of which one month's notice should have been given. Beyond that it establishes nothing which is not clear from the rule.

In the present case the defendants had entered appearance in December, 1962 and Mr. Smith had written many times thereafter to the defendants' solicitors either agreeing to extension of time for filing the defence or requiring them to do so within 48 hours. Even after the lapse of a year from December, 1962 he kept writing several letters asking for the defence to be filed. It never was.

In May, 1964 Messrs. Pillai & Co. filed a notice of change of solicitors on behalf of the defendants in the form required by Order VII, r. 3 and served a copy thereof on Mr. Smith. The defendants and their solicitors knew from January, 1964 onwards that the plaintiffs intended to proceed to judgment. It is true that Messrs. Pillai & Co. entered the picture only at a later stage, i.e. in May, 1964 when Mr. Smith informed them that he was not prepared to grant an extension of time. He, however, held his hand till July, 1964 when he wrote again giving them 48 hours to file defence. It was not till 1st September, 1964 that he proceeded to sign judgment.

The defendants therefore, had ample notice after the expiration of one year from December, 1962 when they entered appearance that the plaintiffs intended to proceed. It is true that Mr. Smith did not serve a formal notice giving one month's notice of intention to proceed but the defendants could not have been left in any doubt of such intention through the various letters written to them. Order LXI, r. 5 does not prescribe the form of the notice as some of the other rules do and *Chitty's* Form at page 1016 of his "Queen's Bench Forms", 18th Edition, is the form usually followed in actual practice even though it has no statutory force. In the absence of a statutory requirement, compliance with the spirit and intention of the rule will suffice so long as notice of some kind is communicated to the other party. As I have said before the other party should not be taken by surprise.

It seems to me therefore, that although there has been a technical non-compliance with the provisions of Order LXI, r. 5 the defendants could not have been prejudiced or surprised. They slept on their defence when they should have applied to the court or a judge for extension of time from the start. They did nothing about proceeding to apply to court for arbitration proceedings either as was suggested by them in January, 1963. They did not even attempt to show that they had any defence on the merits nor did they ever file one. Such delay as there was due entirely to their own default and the indulgence granted by the plaintiffs. It therefore, does not, in my view, lie in their teeth to challenge the validity of the judgment on the tenuous and technical ground that there was no proceeding for more than one year (as a result of this indulgence) and that they were not given one month's notice of intention to proceed. They were given several months' notice in actual fact although no formal one month's notice was given.

Furthermore, I think that the filing in court of the change of solicitors for the defendants in the cause in May, 1964 was a step or proceeding in the proceedings towards judgment and is itself a proceeding within the meaning of the expression as used in Order LXI, r. 5. It gave notice both to the court and to the plaintiffs' solicitors that the defendants intended to defend the action by solicitors. If Mr. Smith's informal notice as conveyed by his letters did not amount to a compliance with the rule, the defendants certainly gave notice that they were more than aware of the action which they were determined to defend. They wanted the action kept alive.

If their notice of change of solicitors can be regarded as a formal step or proceeding in the action then, if they are right, it was given after one year's lapse from the 'last proceeding had', and they themselves should have given the plaintiffs one month's notice of intention to proceed. At first sight this may seem absurd because they should then have given one month's notice of intention to proceed before giving notice of the actual change of solicitors at a time when the plaintiffs had already informed them of their intention to proceed.

The notice of change of solicitors might therefore, be said to be not a proceeding within Order LXI, r. 5. If it is not such a proceeding it is difficult to say what else it can be in the light of the authorities I have cited above. If it was not intended to be a formal step in the action they need not have filed it. Why did they file it and give notice thereof? If they had not filed it, the plaintiffs would have had to give them one month's notice of intention to proceed. As they have, in fact, filed it, can they be heard to say that the plaintiffs should have given them a month's notice of their intention to proceed when they were all along aware of this intention?

In my opinion the equities of the situation lie with the plaintiffs though the defendants may be technically correct but, as they have contributed to the creation of a situation like this to the plaintiffs' detriment, I cannot see any merit in their insistence on a technical one month's notice of intention on the plaintiffs' part to proceed with the action when they themselves seem to have taken an active part to keep the action alive by filing a formal notice of change of solicitors thereby evidencing their readiness and willingness to defend the action. This act

on their part is tantamount to waiver. Even if it is not, I am of the opinion that technical non-compliance with Order LXI, r. 5 is an irregularity (if any) which does not render the final judgment a nullity. It is an irregularity which does not necessarily render the judgment void unless I so direct, under Order LXIII, r. 1 and, for the reasons I have stated, I do not feel disposed to do so. If it is an irregularity then it is one which the court has power to condone at its discretion in the light of all the surrounding circumstances (see *Petty* v. *Daniel* [6]).

I therefore, do not propose to declare the judgment void or to set it aside. The application is therefore, dismissed with costs.

Application dismissed.

Solicitors: *L. A. J. Smith; Pillai & Co.*

OVERSEA CHINESE TRANSPORT CO. LTD. v. PUBLIC PROSECUTOR

[A.Cr.J. (Winslow J.) December 18, 1964]

[Singapore — Magistrate's Appeal No. 81 of 1964]

Road Traffic — Using a vehicle as goods vehicle without licence — Meaning of "goods vehicle" — Motor Vehicles (Goods of Public Service Vehicles Licensing) Rules, 1948, r. 3 — Road Traffic Ordinance (Cap. 227) ss. 2 and 12(1).

In this case a motor vehicle which was drawing a trailer was stopped at the Woodlands check point in Singapore. The trailer was licensed as a goods vehicle in Singapore but the drawing motor vehicle was not licensed. The appellants the owners of the motor vehicle were subsequently charged for using the motor vehicle as a goods vehicle without a licence. The appellants appealed against their conviction and argued that the motor vehicle was merely a drawing vehicle of the nature of a tractor which was neither constructed for use for the carriage of goods nor adapted for such use within the meaning of the definition of "goods vehicle" in section 2 of the Road Traffic Ordinance.

Held: as the motor vehicle in this case was neither constructed nor adapted for the carriage of goods the conviction must be quashed.

Case referred to:—

(1) *James* v. *Davies* [1952] 2 All E.R. 758.

MAGISTRATE'S CRIMINAL APPEAL.

Goh Bin Lay for the appellants.

J. Dorai Raj (Deputy Public Prosecutor) for the respondent.

Winslow J.: In this case I allowed the appeal on 9th December, 1964 stating that I would give my reasons later.

The appellants were charged as follows:—

"That they, on or about the 22nd day of June, 1963 at about 12.20 p.m. at 15¾ m.s. Woodlands check point, Singapore, being the registered owners of motor lorry No. JB. 9003, used the said vehicle in Singapore without same being duly licensed, in contravention of rule 3 of the Motor Vehicles (Goods of Public Service Vehicles Licensing) Rules 1948 and that they thereby committed an offence under section 12(1) of the Road Traffic Ordinance (Chapter 227)."

The facts are that motor vehicle No. JB. 9003, which was drawing a trailer, was stopped at the Woodlands check point before entering Singapore because, according to the prosecution, although the trailer was licensed as a goods vehicle in Singapore the drawing vehicle No. JB. 9003 was not so licensed as required by rule 3 above. The driver refused to return to Johore and he was therefore arrested. Subsequently a report was made and the appellants, who are owners, were charged as above.

It would appear on these facts that no use was made of vehicle No. JB. 9003 at all in Singapore and, in the circumstance, I fail to understand how any one could have been charged for using it in Singapore in contravention of the Singapore law on the subject notwithstanding the fact that it was licensed as a goods vehicle in Johore.

The appeal therefore succeeded on this ground alone although it was surprisingly never raised by the appellants who sought to rely on another ground *viz.*, that the vehicle was merely a drawing vehicle of the nature of a tractor which was neither constructed for use for the carriage of goods nor adapted for such use within the meaning of the definition of "goods vehicle" in section 2 of the Road Traffic Ordinance (Cap. 227).

With this ground I entirely agree. The vehicle had no platform or "body", so to speak, to enable it to carry any goods. It was just an engine on wheels with a cabin for the driver and a pivot behind which could enable it to be used as a drawing vehicle to draw a trailer or any other contrivance on wheels. On this I was asked to hold on the authority of *James* v. *Davies* [1] that it was adapted for use for the carriage of goods. In that case Lord Goddard C.J. said —

"It is found by the justices that the vehicle in question here was constructed for the carriage of goods. Was it being then used for the conveyance of goods? If it was being used to convey goods from one place to another, it seems to me not to matter in the least whether the goods were laden on the vehicle itself or laden in a trailer which the vehicle was drawing. If the view which commended itself to the justices was right, it would follow that furniture removers could move furniture in large pantechnicon trailers, and if they drew them by a vehicle which, though constructed to carry goods, had no furniture in it, it could be said that they were not liable to pay the heavier rate of duty for goods vehicles. I think that once a mechanically propelled vehicle is conveying goods, as this vehicle was conveying the goods, although by means of a trailer, the question becomes easy. The vehicle was adapted for use, and it was being used, for the conveying of goods or burden because it was moving potato trays from one place to another. Accordingly, I think this case must go back to the justices with an intimation that the case was proved."

It must, however, be remembered that the definition of "goods vehicle" in that case, under